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No. 88-1842

In the Supreme Court of the United States

OCTOBER TERM, 1989

OSCAR PORCELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner was convicted of multiple violations of the federal mail fraud statute and a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) in connection with a scheme to avoid paying $4,755,000 in New York State gasoline sales taxes. The questions presented are:

1. Whether the court of appeals properly rejected petitioner's contention that his mail fraud convictions should be reversed because his failure to pay the taxes did not deprive the State of its property.

2. Whether the court of appeals properly rejected petitioner's contention that his RICO conviction should be reversed because federal mail fraud violations based on failure to pay state taxes cannot serve as predicates for a RICO prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 865 F.2d 1352. The district court's pretrial and post-trial opinions (Pet. App. 38a-42a, 43a-77a, 78a-95a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 102a-103a) was entered on January 11, 1989. A petition for rehearing was granted in part and denied in part on February 14, 1989 (Pet. App. 35a). On March 30, 1989, Justice Marshall extended the time in which to file a petition for a writ of certiorari to May 15, 1989, and the peti-

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tiorwas filed on May 12, 1989. The jurisdiction of this Cort is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on 6 counts of mail fraud, 18 U.S.C. 1341, and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, by conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)). The district court sentenced petitioner to concurrent terms of two years' imprisonment on each of the 62 counts and ordered petitioner to forfeit $4,755,000, but it suspended execution of all but six months of the custodial sentence and placed petitioner on probation for five years. Pet. App. 96a-98a. The court of appeals reversed petitioner's convictions on six of the mail fraud counts. It also reversed the forfeiture judgment and remanded that part of the case for further proceedings in the district court. In all other respects, the court of appeals affirmed. Pet. App. 1a-34a.

1. Petitioner is involved in the retail gasoline sales business in the New York City area. New York law requires that retailers register with the State, obtain a certificate of authority to collect sales taxes, and complete quarterly sales tax returns setting forth the total dollar amount of their quarterly sales and remitting the sales taxes due on those sales. The evidence at trial showed that from 1978 through 1982 petitioner used the United States mail to file some 100 fraudulent New York State sales tax returns from 12 retail gasoline stations that petitioner owned in whole or in part. As a result, petitioner failed to pay $4,755,000 in state gasoline sales taxes. Pet. App. 2a, 4a-6a, 14a, 44a, 47a.

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Petitioner began submitting the fraudulent sales tax forms in 1978, while he was in partnership with Jimmy Garcia Sorrentino. Petitioner and Sorrentino dissolved the partnership in 1979 and divided the jointly owned gas stations between themselves. Petitioner, who admitted that he exercised total control over his business, continued to submit fraudulent forms for the gas stations that he retained. He directed his accountant to prepare and file false sales tax returns for the various stations, to structure the corporate ownership of the stations to reduce the probability of detection, and to prepare a "dummy" set of records. In addition, he offered to pay his accountant $200,000 if the accountant would exculpate petitioner and accept full responsibility for the fraud. Pet. App. 4a-7a.

A New York state sales tax auditor determined, based on a comparison of petitioner's wholesale gasoline purchases and the sales reported on petitioner's returns, that petitioner's scheme had resulted in an enormous understatement of his tax liability. The auditor calculated that during the last year of petitioner's partnership with Sorrentino, petitioner and Sorrentino made more than $13,562,000 in gasoline sales, but they reported only $3,580,000 of that amount to state authorities, resulting in a sales tax underpayment of some $798,000. Similarly, the auditor determined that in the three-and-a-half year period following the termination of petitioner's partnership with Sorrentino, petitioner made more than $69,600,000 in gasoline sales, but he reported only $20,330,000 of that amount, resulting in a sales tax underpayment of $3,957,000. Thus, the auditor conservatively estimated that petitioner had failed to pay a total of at least $4,755,000 in state gasoline sales taxes. Pet. App. 6a.

2. Petitioner appealed the mail fraud convictions, the RICO conviction, and the judgment of forfeiture. He contended, among other matters, that this Court's decision in

McNally v. *United States*, 483 U.S. 350 (1987), required reversal of his mail fraud convictions and that RICO should not be applied to punish a failure to pay state taxes. The court of appeals rejected both of these arguments. The court interpreted *McNally* as limiting the reach of the mail fraud statute to schemes that have as their object the deprivation of property interests. Pet. App. 11a-12a. But the court concluded that "[b]y virtue of his scheme to defraud, i.e., the false sales tax returns, [petitioner] was in a very real sense 'depriving' the State of its property" (*id.* at 15a). The court also concluded that the RICO prosecution was appropriate "by virtue of the extraordinarily broad sweep of RICO" (*id.* at 3a). Judge Newman dissented, reasoning that this Court's decision in *McNally* required reversal of the mail fraud convictions and thereby eliminated the predicate for the RICO conviction.[1]

ARGUMENT

1. This Court ruled in *McNally* v. *United States*, *supra*, "that the mail fraud statute does not reach 'schemes to defraud citizens of their intangible rights to honest and impartial government,' and that the statute is 'limited in

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[1] The court of appeals also decided a number of matters that are not at issue here. Specifically, the court rejected other challenges to the convictions, including a due process objection to the application of the mail fraud statute (Pet. App. 7a-10a), a challenge to the sufficiency of the evidence showing a racketeering enterprise (*id.* at 17a-22a), and a claim of ineffective assistance of counsel (*id.* at 26a-27a). In addition, the court reversed petitioner's conviction on six counts of mail fraud based on its determination that those particular mailings were not in furtherance of petitioner's scheme to defraud (*id.* at 10a-11a). It also reversed the judgment of forfeiture and remanded that portion of the case for further consideration based on its determination that some of the forfeited businesses may be subject to only partial forfeiture (*id.* at 22a-26a).

scope to the protection of property rights.' " *Carpenter* v. *United States*, 108 S. Ct. 316, 320 (1987) (quoting *McNally*, 483 U.S. at 355, 360). The Court explained that:

> the words "to defraud" commonly refer "to wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching."

McNally, 483 U.S. at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). See *Carpenter*, 108 S. Ct. at 321. The Court concluded that "Congress' intent in passing the mail fraud statute was to prevent the use of the mails in the furtherance of such schemes." *McNally*, 483 U.S. at 359.

Petitioner does not contest that he used a "dishonest method or scheme" of mailing false tax returns to avoid paying New York State sales taxes. Furthermore, petitioner concedes that, as a result of this deceit, he did not pay and continues to owe New York more than four million dollars in past taxes. Pet. 9, 20. Petitioner nevertheless contends that he did not "defraud" New York of those tax revenues because "the uncollected and unpaid taxes [petitioner] owed New York were not New York's money." *Id.* at 9. He further contends that his conduct, which he characterizes as simply "owing taxes and not paying them * * * cannot constitute mail fraud under *McNally*." *Id.* at 11. These contentions are without merit.

Petitioner unsuccessfully argued at trial that he had simply borrowed New York's tax revenues to cultivate business opportunities. See Pet. App. 47a, 85a. He now characterizes those supposed " 'loans' from the state" (Pet. App. 85a) somewhat differently in an attempt to fit this case within the principles of *McNally*. Petitioner contends

that he "could not be said to have deprived the State of its *money*, because he was not shown to have collected any sales taxes." Pet. 9 (emphasis in original). But petitioner's attempt to recharacterize his fraud does not alter the fact that he deprived New York of its property interest in the tax revenues generated by his gasoline sales. As the court of appeals explained:

> In fact, [petitioner], as he knew he was doing, obtained cash, and this is true whether or not he actually collected the sales tax on his gasoline sales. If he did not collect the tax, then he obtained funds that an honest retailer, selling for the same price, would have remitted to the State. If he did collect the tax (as would have been proven if there had been evidence that it was posted on signs) but failed to remit, then, of course, he obtained money and surely deprived the State. In any event, New York lost money as a result of [petitioner's] schemes, that is to say, lost the sales tax proceeds due from his sales of gasoline even though it maintains a civil right, or chose in action, to obtain the proceeds.

Pet. App. 12a. As the court of appeals further explained, New York law specifically recognizes that the State has a legally protected property interest in the tax revenues at issue, in the form of a tax obligation owed by petitioner, whether or not petitioner actually collected the tax at the time of his gasoline sales. *Id.* at 13a-15a. Petitioner thus defrauded New York by " 'wronging [the State] in [its] property rights by dishonest methods or schemes,' " *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt*, 265 U.S. at 188), regardless of whether he notified his customers that he was collecting a tax. "By virtue of his scheme to defraud, i.e., the false sales tax returns, he was in a very real sense 'depriving' the State of its property." Pet. App. 15a.

Petitioner's additional contention that he was prosecuted for simply "owing taxes and not paying them" is also incorrect. This does not involve a mere "failure to pay taxes." Pet. 10. Petitioner used the mails in a dishonest scheme to *defraud* the State of New York by misrepresenting his tax obligations. As the court of appeals explained:

> A vendor may undertake to defraud the State by failing to collect sales taxes and then pocketing the money that he owes in taxes. This is quite different from "simply . . . failing to pay [a] debt."

Pet. App. 13a n.1. In this instance, petitioner "systematically underpaid his sales taxes and concealed what he was doing." *Ibid.* Although petitioner claims that he simply defrauded New York of its "ethereal interest" (Pet. 9) in the collection of tax revenues, that interest was sufficiently concrete that he could spend it, by his own admission, "on the expansion of his business." Pet. App. 85a. Because petitioner deprived the State of New York of a concrete property interest by means of a fraud that was executed through the use of the mails, petitioner's scheme fell within the reach of the mail fraud statute. See *United States* v. *Ianniello*, 808 F.2d 184, 193-194 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987); *United States* v. *De Fiore*, 720 F.2d 757, 761-762 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984).[2]

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[2] There is no merit to petitioner's argument (Pet. 16-18) that the theory on which the court of appeals affirmed his convictions was not presented to the jury. The indictment clearly charged petitioner with defrauding the State of a property interest – namely, the sales tax due on the retail sale of gasoline – through petitioner's failure to file accurate tax returns. The trial court likewise instructed the jury on that charge. See C.A. App. 310-313. As the court of appeals explained, that instruction required the jury to find that petitioner "knowingly

Petitioner is also mistaken in asserting (Pet. 11-16) that the court of appeals' decision conflicts with decisions of other circuits. As the court of appeals recognized in this case (Pet. App. 8a-9a), other circuits have uniformly applied the mail and wire fraud statutes in schemes to defraud States of tax revenues. See *United States* v. *Melvin*, 544 F.2d 767 (5th Cir.), cert. denied, 430 U.S. 910 (1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975); *United States* v. *Mirabile*, 503 F.2d 1065 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975); *United States* v. *Flaxman*, 495 F.2d 344 (7th Cir.), cert. denied, 419 U.S. 1031 (1974). Petitioner does not cite any of these cases, and none of the cases that petitioner does cite involves the application of the mail or wire fraud statutes to schemes to defraud States of tax revenues.

For example, petitioner contends (Pet. 11-12) that the court of appeals' decision conflicts with *United States* v. *Gimbel*, 830 F.2d 621 (7th Cir. 1987). In that case, an indictment charged that the defendant had engaged in a scheme to deprive the Treasury Department of "accurate

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and willfully defrauded the State of money due from sales taxes," Pet. App. 16a n.2, which accurately describes petitioner's offense.

Petitioner also claims (Pet. 11) that the trial court's specific intent instruction, which he did not challenge below (see Gov't C.A. Br. 20), allowed the jury to convict him even if the jury did not find that he deprived the State of property. He bases this claim on the instruction's language requiring the jury to find that petitioner's scheme contemplated some loss to the State or some gain to petitioner. See C.A. App. 315, 317. Petitioner now argues that giving the jury the alternative of convicting him if the jury found that he gained from his scheme violates *McNally*'s requirements. But in context, the jury could only have determined that petitioner "gained" from his scheme if the jury also found that the State was deprived of money owed to it. That is all the more clear in light of the fact that the trial court instructed the jury that the mail fraud charges involved defrauding the State of sales tax due. See Pet. App. 16a n.2.

and truthful information and data" concerning currency transactions. *Id.* at 626. The court concluded that the indictment was defective under *McNally* because "the jury was not required to find that the scheme resulted in the government being deprived of money or property." *Id.* at 627. *Gimbel* is thus clearly distinguishable from the instant case, where the jury was required to make such a finding. See Pet. App. 16a n.2. Furthermore, the Seventh Circuit in *Gimbel* specifically "express[ed] no view as to whether a scheme to deprive the government of tax dollars can ever be cognizable under the mail fraud statute." 830 F.2d at 627 n.3. Thus, there is no conflict between *Gimbel* and the decision in this case.

Petitioner also contends (Pet. 12-13) that the court of appeals' decision conflicts with a subsequent Seventh Circuit case, *United States* v. *Eckhardt*, 843 F.2d 989, cert. denied, 109 S.Ct. 106 (1988). In that case, the Seventh Circuit held that a wire fraud indictment alleging that the scheme impaired the federal government's determination and collection of income tax was defective under *McNally*. 843 F.2d at 996-997. The court emphasized, however, that the indictment was defective because it "does not specifically allege that [the defendant] deprived the government of revenue." *Id.* at 997. The court explained that "[t]he connection between the charged conduct and the loss of revenue here is too tenuous and speculative to constitute an actual deprivation of money or property." *Ibid.* In the present case, by contrast, the government specifically alleged and proved that petitioner had deprived the State of sales tax revenue. Thus, there is no conflict between the court of appeals' decision and *Eckhardt*.

Finally, petitioner cites (Pet. 13-19) a series of post-*McNally* cases that, like *McNally*, involve mail fraud prosecutions based on bribery of public officials. See, *e.g.*, *United States* v. *Egan*, 860 F.2d 904 (9th Cir. 1988);

United States v. *Slay,* 858 F.2d 1310 (8th Cir. 1988). Those cases, however, have little relevance here since, as petitioner concedes, he "was not a state official, nor did his conduct deprive anyone of a right to his 'honest services.' Pet. 19 n. 21. In any event, Congress recently amended the mail and wire fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. Thus, the mail fraud statute now expressly authorizes such prosecutions.[3] The post-*McNally* cases that petitioner cites are therefore of no continuing importance and provide no basis for this Court's review.

2. Petitioner also argues (Pet. 20-27) that court of appeals erred in affirming his RICO conviction. He contends that the federal government is not entitled to bring "a *criminal* RICO case for a failure to pay state taxes when that failure was *not* criminal under state law" (Pet. 21 (emphasis in original)). The predicate for petitioner's RICO prosecution, however, was not a "failure to pay state taxes." Rather, the government established a pattern of racketeering activity, in accordance with RICO's explicit provisions, based on petitioner's repeated violation of the mail fraud statute. RICO specifically identifies mail fraud as a "racketeering activity" (18 U.S.C. 1961(1) (Supp. V 1987)) and further provides that a "pattern of racketeering activity" may be established by "at least two acts of racketeering activity" (18 U.S.C. 1961(5)). The government's proof of more than 50 related mail fraud violations

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[3] The legislative history of the new provision indicates that Congress intended to nullify the *McNally* decision completely. See 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) ("This section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.").

during a four-year period amply demonstrated a pattern of racketeering activity punishable under RICO. See *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, No. 87-1252 (June 26, 1989).

Petitioner additionally argues that the court of appeals' decision conflicts with the Sixth Circuit's unpublished decision in *Michigan Dept. of Treasury* v. *Fawaz*, 848 F.2d 194 (1988) (Table). That case, however, does not create a conflict warranting this Court's review. As an initial matter, the unpublished decision has limited value as circuit precedent under the Sixth Circuit's local rules of procedure and would not bind future Sixth Circuit panels.[4] Even if it had meaningful value as precedent, it has little relevance to the present case. In *Fawaz*, the court of appeals held that a State is not entitled to bring a RICO civil action to collect unpaid state taxes because the State's use of this remedy "would demean the intent of those in Congress who sought to address the serious threat posed to the country's economy by organized crime." 8 RICO L. Rep. 160, 161 (1988). The court's concern that States would employ RICO's civil provisions "to designate district courts as collection agencies for unpaid state taxes" (*ibid.*) has no application in the present situation, where the federal government has brought a criminal racketeering prosecution based on petitioner's use of the mails in schemes to defraud.

Although petitioner asserts a "direct conflict" only with respect to the Sixth Circuit's *Fawaz* decision (Pet. 20), he also contends that the court of appeals' decision is inconsistent with the Eighth Circuit's decision in *Ornest* v. *Delaware North Companies, Inc.*, 818 F.2d 651 (1987),

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[4] See Sixth Circuit Rule 24(b) (stating that citation of unpublished decisions "is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case").

which affirmed the dismissal of a RICO complaint based on a " 'single fraudulent scheme' " (Pet. 23 (quoting 818 F.2d 652)). This Court, however, has recently rejected the Eighth Circuit's requirement that a RICO complaint allege multiple illegal schemes (*H.J. Inc.*, slip op. 5-6). There is therefore no live conflict between the decision of the court below and the Eighth Circuit with respect to the applicability of the RICO statute to a pattern of racketeering activity consisting of a single fraudulent scheme.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

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[5] Petitioner also claims that there is a conflict between the decision in this case and the Fifth Circuit's decision in *Delta Truck & Tractor, Inc.* v. *J.I. Case Co.*, 855 F.2d 241 (1988), cert. denied, 109 S. Ct. 1531 (1989), which he characterizes as insulating "legitimate" businesses from RICO prosecution (Pet. 23-24). The Fifth Circuit did not purport to insulate "legitimate" businesses (whatever that term means) from RICO liability. Instead, the Fifth Circuit held that a RICO complaint based entirely on a single business transaction did not adequately plead that the defendants were engaged in continuing criminal conduct of the sort reached by the RICO statute. In this case, petitioner's illegal conduct was not confined to a single transaction, but extended over a duration of several years and thus clearly reflected continuity of criminal activity.

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